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Yui Chin Song & Ors v Lee Ming Chai & Ors

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-118–10 OF 2017(N)
RICHARD MALANJUM CHIEF JUSTICE, AHMAD MAAROP PCA, ZAHARAH IBRAHIM CJ (MALAYA), RAMLY ALI AND ALIZATUL KHAIR FCJJ
C 5 APRIL 2019

Companies and Corporations — Directors — Loans to — Whether company gave loan to any prohibited person — Whether illegal for company to provide security on own assets to secure loan for itself — Companies Act 1965 ss 67, 133A(1)(a) & (1)(b)

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Companies and Corporations — Shares — Transfer of shares — Whether a transfer is void by reason of insolvency of the transferor — Whether subsequent transfer of shares by insolvent transferee also void for want of title — Protection for bona fide transactions — Whether title of any subsequent transferee who gave valuable consideration and acted in god faith remain — Whether plaintiffs established their claim on balance of probabilities — Whether plaintiffs justified in asking for declaratory order — Whether plaintiffs complaint on issue of no case to answer by defendant baseless and without merit — Bankruptcy Act 1967 ss 52 & 54

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This was an appeal by the plaintiffs against the decision of the Court of Appeal which affirmed the decision of the High Court in dismissing the plaintiffs' claim. The questions to be determined were: (a) whether a transfer to a transferee void if the transferor was insolvent and subsequent transfer also void for want of title; (b) whether s 41 of the Specific Relief Act 1950 was a complete code governing an action for a declaration; and (c) where there were several defendants to an action and all of whom save one made a submission of no case to answer, whether the defendants who made a submission of no case to answer were entitled to call evidence. The dispute centered on the issue of shares and directorship in a family company which at the material time was dealing in investment and property development. In 2003, Cha Bok and Tui Eng transferred their shares in the company to their son, Yui Chin Chau and his wife Tew Su Keow who were both made directors of the company. As at January 2006, the company comprised of all the plaintiffs as shareholders whilst the first, second and fourth plaintiffs were directors. Cha Bok was declared bankrupt on 9 November 2006 and his wife Tui Eng was declared bankrupt on 23 August 2007 and Chin Chau was declared bankrupt on 25 March 2007.

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Before his bankruptcy Chin Chau transferred all his shares to the first, second and third plaintiffs and Su Keow transferred part of her shares to the first, second and third plaintiffs. The main contention of the plaintiffs was that the first defendant had offered a loan to Cha Bok and had with undue influence persuaded the plaintiffs and Cha Bok to make him one of the directors of the company on a promise to obtain a bank loan for the company which was in financial difficulty at the time and to exonerate Cha Bok of his debts and that he would resign as director and surrender the shares of the company after the bank loan was procured. The company was granted a loan in 2006. However the first defendant failed to exonerate Cha Bok of his debts and failed to surrender his shares and resigned as director as promised earlier. The plaintiffs then discovered that they were no longer directors of the companies and their shares had been transferred to the first to fourth defendants by fraud perpetuated by the first defendant with the assistance of the fifth defendant.

Held, dismissing the appeal with costs:

(1) Section 52 of the Bankruptcy Act 1967 affects only settlement or transfer of shares by the bankrupt transferor. Subsequent transferees like the defendants did not fall within the ambit under s 52. That being the case, the plaintiffs in this present case cannot invoke s 52 to avoid the transfers of the shares. Under the section, any transfer of property shall be absolutely void against the DGI if the transferor becomes a bankrupt after two years but within five years after the date of transfer. It was not disputed that their bankruptcies occurred after the transfer but within the five years. Section 52 is not meant to avoid all transaction or settlement of property executed by the settlor within the stipulated period therein. Section 54 of the same Act provides protection for bona fide transactions without notice. The transfer of a movable property by a transferor who was insolvent or adjudged bankrupt to a transferee was void. However, a further transfer of the said property by the said transferee to a subsequent transferee was not void for want of title if the subsequent transferee had given valuable consideration and had acted in good faith in the transaction. The plaintiffs did not have locus standi to bring this action against the defendants, only the DGI was entitled to do so under s 52 (see paras 23–29 & 63).

(2) The particulars of fraud pleaded by the plaintiffs were fact-based. The learned trial judge who had heard and observed the witnesses was in the best position to decide on the matter. The learned judge found that the plaintiffs had failed to establish their claim against the defendants on the balance of probabilities and the Court of Appeal affirmed the decision. The court was of the same view as the Court of Appeal therefore the plaintiff's attempt to get the transfer of shares declared void must fail and be dismissed (see paras 32–34).

(3) The transfer of shares in the present case were not avoided under s 52 against any person except DGI. Therefore, the issue submitted by the plaintiffs did not arise and the court was of the view that question 2 need not be answered (see paras 37–38).

(4) It was for the plaintiff to prove his case and satisfy the court that his claim was well-founded before the court could grant judgment on his claim. The fact that the defendant had led no evidence or called no witnesses did not absolve the plaintiff from discharging his burden. In this case, the trial judge had made the correct findings on the factual issues in questions that the plaintiffs had failed to establish the elements of fraud, forgery and undue influence and the findings were affirmed by the Court of Appeal. The court held that the plaintiffs' contention on the issue was baseless and without merit, therefore question 3 need not be specifically answered (see paras 49 & 52–53).

(5) A plain reading of s 133A of the Companies Act 1965 showed that in order to invoke the prohibition under sub-s (1)(a), there must be evidence to show that it is the company itself (in this case Tampin Theme Park) that gives loan to the prohibited person. For s 133A(1)(b) to come into play, there must be evidence to show that the company must be the guarantor to a loan given to any person connected with its director or a director of its holding company; or the company provides security in connection with the loan in question, hence the question of the prohibition under s 133A did not arise at all (see paras 56–57).

(6) The shares which were acquired by the first, second, third and fourth defendants were conditional, implying a form of financial assistance by the company to deal with its own shares. There is nothing illegal under the s 67 for a company to provide security on its own assets for the purpose of securing a loan for itself (see paras 58 & 62).

[Bahasa Malaysia summary

Ini merupakan rayuan plaintif terhadap keputusan Mahkamah Rayuan yang mengekalkan keputusan Mahkamah Tinggi dalam mengetepikan tuntutan plaintif. Persoalan untuk diputuskan adalah: (a) sama ada satu pemindahan kepada penerima pindahan adalah terbatal sekiranya pemindah adalah tidak solven dan pemindahan seterusnya adalah terbatal kerana ketiadaan hak milik; (b) sama ada s 41 Akta Relif Spesifik 1950 merupakan akta lengkap yang menguruskan tindakan untuk satu deklarasi; dan (c) apabila wujud beberapa defendan dalam satu tindakan yang mana kesemuanya kecuali membuat hujahan bahawa tiada kes untuk dijawab, sama ada defendan yang membuat hujahan tersebut berhak untuk memanggil keterangan. Pertelingkahan ini berasaskan isu saham dan pengarah satu syarikat keluarga yang pada waktu material berurusan dengan pelaburan dan pembangunan hartanah. Dalam tahun 2003, Cha Bok dan Tui Eng telah memindahkan saham mereka kepada

anak mereka, Yui Chin Chau dan isterinya Tew Su Keow yang mana kedua-dua mereka dijadikan pengarah syarikat tersebut. Pada Januari 2006 syarikat tersebut terdiri daripada semua plaintif sebagai pemegang saham dan plaintif pertama, kedua dan keempat merupakan pengarah. Cha Bok diisytiharkan muflis pada 25 Mac 2007. Sebelum kemuflisannya, Chin Chau telah memindahkan semua sahamnya kepada plaintif pertama kedua dan ketiga. Hujahan utama adalah defendan pertama telah menawarkan satu pinjaman kepada Cha Bok dan dia dengan pengaruh tidak wajar memujuk plaintif dan Cha Bok untuk menjadikannya salah seorang pengarah syarikat tersebut dengan janji untuk mendapatkan pinjaman bank untuk syarikat tersebut yang mana berada dalam kesusahan kewangan dan membebaskan Cha Bok daripada hutangnya dan dia akan meletakkan jawatan sebagai pengarah dan menyerahkan kembali saham dalam syarikat tersebut selepas pinjaman bank telah diperoleh. Syarikat tersebut telah diberikan pinjaman pada tahun 2006. Namun defendan pertama gagal untuk membebaskan Cha Bok dari hutangnya dan gagal untuk menyerahkan kembali sahamnya dan meletakkan jawatan sebagai pengarah sepertimana dijanjikan. Plaintif kemudiannya mendapati bahawa mereka bukan lagi pengarah syarikat tersebut dan saham mereka telah dipindahkan kepada defendan pertama ke keempat melalui fraud yang dilakukan oleh defendan pertama dengan bantuan defendan kelima.

Diputuskan, menolak rayuan dengan kos:

(1) Seksyen 52 Akta Insolvensi 1967 hanya mempunyai kesan kepada penyelesaian atau pemindahan saham oleh pemindah yang muflis. Oleh itu, pemindah seperti defendan tidak terjumlah di bawah s 52. Oleh itu, plaintif dalam kes ini tidak boleh menggunakan s 52 untuk mengelak pemindahan saham tersebut. Dibawah seksyen ini, apa-apa pemindahan harta akan terbatal terhadap DGI sekiranya pemindah menjadi muflis dua tahun selepas tetapi dalam tempoh limat tahun selepas tarikh pemindahan. Ianya tidak dinafikan bahawa kemuflisan tersebut berlaku selepas pemindahan tetapi dalam tempoh lima tahun. Seksyen 52 tidak bertujuan untuk mengelakkan semua transaksi atau penyelesaian harta dilaksanakan oleh penyelesai dalam tempoh masa yang dinyatakan didalamnya. Seksyen 54 akta yang sama memperuntukkan pelindungan kepada transaksi bona fide tanpa notis. Pemindahan harta boleh pindah oleh pemindah yang tidak solven atau dihakimi muflis kepada satu pemindah adalah terbatal. Namun, satu pemindahan lanjut harta tersebut oleh pemindah tersebut tidak terbatal kerana tiada hakmilik sekiranya penerima pindahan tersebut telah memberikan balasan berharga dan bertindak dengan niat baik dalam transaksi tersebut. Plaintif tidak mempunyai locus standi untuk membawa tindakan ini terhadap defendan, hanya DGI berhak untuk berbuat sedemikian di bawah s 52 (lihat perenggan 23–29 & 63).

(2) Butiran fraud yang diplid oleh plaintif adalah berasaskan fakta. Hakim

bicara terpelajar yang mendengar dan meneliti saksi berada dalam kedudukan terbaik untuk memutuskan perkara tersebut. Hakim terpelajar mendapati bahawa plaintif gagal untuk membuktikan tuntutan mereka terhadap defendan atas imbangan kebarangkalian dan Mahkamah Rayuan mengekalkan keputusan ini. Mahkamah ini mempunyai pandangan yang sama seperti Mahkamah Rayuan dan oleh itu cubaan plaintif untuk pemindahan saham tersebut diisytiharkan terbatal hendaklah gagal dan ditolak (lihat perenggan 32–34).

(3) Pindahan saham dalam kes ini tidak dielakkan di bawah s 52 terhadap mana-mana orang kecuali DGI. Oleh itu, isu yang dihujahkan oleh plaintif tidak berbangkit dan mahkamah berpendapat bahawa soalan 2 tidak perlu dijawab (lihat perenggan 37–38).

(4) Beban berada pada plaintif untuk membuktikan kesnya dan memuaskan hati mahkamah bahawa tuntutannya berasas sebelum mahkamah boleh memberikan penghakiman terhadap tuntutannya. Fakta yang defendan tidak mengemukakan apa-apa keterangan atau tidak memanggil saksi tidak membebaskan plaintif untuk melepaskan bebannya. Dalam kes ini, hakim bicara membuat dapatan yang tepat atas isu fakta yang berbangkit dan plaintif gagal untuk membuktikan elemen fraud, pemalsuan dan pengaruh tidak wajar dan dapatan ini dikekalkan oleh Mahkamah Rayuan. Mahkamah memutuskan bahawa hujahan plaintif atas isu tersebut adalah tidak berasas dan tanpa merit, oleh itu soalan 3 juga tidak perlu dijawab secara spesifik (lihat perenggan 49 & 52–53).

(5) Bacaan biasa s 133A Akta Syarikat 1965 menunjukan bahawa untuk menggunakan peruntukan dibawah sub-s (1)(a), perlu ada keterangan untuk menunjukan syarikat tersebut (dalam kes ini Taman Tema Tampin) memberikan pinjaman keapda orang yang dilarang. Untuk s 133A(1)(b) digunakan, perlu ada keterangan untuk menunjukan bahawa syarikat tersebut perlu menjadi penjamin kepada pinjaman yang diberikan kepada apa-apa orang yang berkaitan dengan pengarahnya atau pengarah syarikat pegangannya atau syarikat tersebut memberikan cagaran berkaitan dengan pinjaman tersebut, oleh itu soalan larangan di bawah s 133A tidak berbangkit langsung (lihat perenggan 56–57).

(6) Saham yang didapati oleh defendan pertama, kedua, ketiga dan keempat adalah bersyarat, memerlukan satu bentuk bantuan kewangan oleh syarikat untuk berurusan dengan sahamnya. Tiada apa-apa perkara yang salah disisi undang-undang di bawah s 67 untuk satu syarikat memberikan cagaran kepada asetnya sendiri untuk tujuan mendapatkan pinjaman itu untuk dirinya sendiri (lihat perenggan 58 & 62).]

Notes

For cases on loans to directors, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 378–382.

For cases on transfer of shares, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1235–1272.

Cases referred to

Alexander v Rayson [1936] 1 KB 169, CA (refd)
Laurie v Raglan Building Co Ltd [1942] 1 KB 152, CA (refd)
Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 3 MLJ 81, CA (refd)
Ramayee Gengau & Ors v Tan Yik Kok & Anor [1983] 1 CLJ 326, HC (refd)
Simirah v Chua Hock Lee & Anor [1963] 1 MLJ 239, CA (refd)
Storey v Storey [1961] P 63, CA (refd)
Supreme-General Films Exchange Ltd v His Highness Maharaja Sir Brijnath Singhji Deo & Ors 1975 AIR 1810, SC (refd)
Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 3 MLJ 609, FC (refd)
Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177, FC (refd)
Young v Rank [1950] 2 KB 510, KBD (refd)
Yuill v Yuill [1945] 1 All ER 183, CA (refd)

Legislation referred to

Bankruptcy Act 1967 ss 3, 3(1), 3(1)(i), 47, 47(1), 52, 52(1), 53B, 53B(3), 54, 54(1)
Companies Act 1965 ss 67, 67(1), 133A, 133A(1), (1)(a), (1)(b), Form 32A
Rules of Court 2012 O 15 r 16, O 35 r 4(5)
Rules of the High Court 1980 O 15 r 16
Specific Relief Act 1950 s 41

Appeal from: Civil Appeal Nos N-02(W)-1305–08 of 2015 and N-02-(W)-1038–06 of 2015 (Court of Appeal, Putrajaya)

Gopal Sri Ram (Pramjit Kaur, David Yii, Demien Chan and Khairul Anwar with him) (Mann & Assoc) for the appellants.
GK Ganesan (Cheang Sek Kwan, Lim Fong Say, James Huntzen Ong and Sukhvinder Singh Sidhu) (Chan & Assoc) for the first, second, third, fourth and sixth respondents.
Iruthaya Raj (Raj Selva & Co) for the fifth respondent.

Ramly Ali FCJ (delivering judgment of the court):

[1] The appellants in the present appeal were, at the material time, shareholders in the sixth respondent company (Tampin Theme Park). The first, second and fourth appellants were the directors there. The appellants were the plaintiffs in the action at the High Court. In this judgment, the parties will be referred to as they were in at the High Court.

[2] In their statement of claim before the High Court, the plaintiffs sought for declaratory orders that the transactions for the transfer of shares in Tampin Theme Park by the plaintiffs in favour of the first, second, third and fourth defendants were null and void; and the appointment of the first respondent ('Ming Chai') as director of the company was void, on the ground that the shares were transferred by fraud and undue influence perpetrated by Ming Chai with the assistance of the fifth respondent (the new company secretary appointed by Ming Chai).

[3] The High Court dismissed the plaintiffs' claim with costs. The Court of Appeal affirmed the decision of the High Court and dismissed their appeal. The plaintiffs then filed a notice of appeal to this court. The appeal was against the whole of the decision of the Court of Appeal.

[4] On 10 October 2017 this court granted leave to appeal on the following questions:

(a) where the court holds that a transfer of movable property by a transferor to a transferee is void by reason of insolvency of the transferor, then is a transfer by the said transferee to a subsequent transferee also void for want of title? (Question 1);

(b) whether s 41 of the Specific Relief Act 1950 is a complete code governing an action for a declaration having regard to the decision of the Indian Supreme Court in *Supreme-General Films Exchange Ltd v His Highness Maharaja Sir Brijnath Singhji Deo & Ors* 1975 AIR 1810 and that of the Federal Court of Malaysia in *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 (Question 2); and

(c) where there are several defendants to an action all of whom save one make a submission of no case to answer, are the defendants who made a submission of no case to answer entitled to call evidence having regard to the decision in *Alexander v Rayson* [1936] 1 KB 169 and *Simirah v Chua Hock Lee & Anor* [1963] 1 MLJ 239 at p 241 and to the provisions of O 35 r 4(5) of the Rules of Court 2012 (Question 3).

[5] The grounds posed by the plaintiffs to support the appeal are as follows:

(a) the High Court misdirected in law in dismissing the plaintiffs' claim against the defendants with costs;

(b) the High Court misdirected itself in holding that the first to fourth plaintiffs had no standing to recover the shares that had been transferred to the first to fifth defendants on the ground that the first to fourth plaintiffs had earlier acquired their titles from an insolvent vendor;

(c) the High Court having found that the first to fourth plaintiffs had no title to the shares, should have gone on to hold that the first to fifth defendants acquired no title from them;

(d) the High Court erred in applying s 41 of the Specific Relief Act 1950 without considering the principles that govern the remedy of declaration;

(e) the High Court ought to have held that a plaintiff seeking a declaration under O 15 r 16 of the Rules of Court 2012 did not have to show that he had a present cause of action;

(f) the High Court failed to follow and apply the decisions in *Alexander v Rayson* [1936] 1 KB 169 and *Simirah v Chua Hock Lee & Anor* [1963] MLJ 239, when permitting a defendant who had elected to make a submission of no case to answer, to call evidence;

(g) the High Court erred in law in failing to draw proper inferences from the totality of evidence before it;

(h) the High Court erred in law and/or in fact in failing to take into account relevant consideration when arriving at its decision;

(i) the High Court erred in law and/or in fact in taking into account irrelevant consideration when arriving at its decision;

(j) the High Court failed to apply sufficiently or at all the correct principles of law applicable to the case before it and thereby misdirected itself which misdirection had occasioned a miscarriage of justice; and

(k) the Court of Appeal erred in affirming the whole decision of the High Court.

BRIEF FACTS

[6] The dispute in the present case centred on the issue of shares and directorship in a family company, Tampin Theme Park, which at the material time, was dealing in investment and property development. The company was originally founded by Yui Cha Bok ('Cha Bok') and his wife, Lee Tui Eng ('Tui Eng').

[7] In 2003 Cha Bok and Tui Eng transferred their shares in the company to their son, Yui Chin Chau ('Chin Chau') and his wife, Tew Su Keow ('Su Keow'). Both were made directors of the company. As at January 2006, the company comprised all the plaintiffs as shareholders, whilst the first, second and fourth plaintiffs were directors.

[8] Cha Bok was declared bankrupt on 9 November 2006, his wife Tui Eng was declared bankrupt on 23 August 2007 and Chin Chau was declared

bankrupt on 25 March 2007. Before his bankruptcy Chin Chau transferred all his shares (comprising shares transferred earlier to him by Cha Bok and Tui Eng to the first, second and third plaintiffs and his wife Su Keow, transferred part of her shares comprising shares transferred earlier to her by Cha Bok and Tui Eng) to the first, second and third plaintiffs.

[9] The main complaint by the plaintiffs was against Ming Chai, the first defendant in the suit. The plaintiffs alleged that Ming Chai was an unlicensed money lender who had offered loan to Cha Bok since the year 2003; and had, by undue influence, persuaded the plaintiffs and Cha Bok to make him one of the directors of the company on a promise to obtain bank loan for the company which was in financial difficulty at that time, and to exonerate Cha Bok of his debts; and that he would resign as a director and surrender the shares of the company after the bank loan was procured.

[10] The plaintiffs alleged that when Ming Chai became a director of the company, by fraud and undue influence he took control of the management of the company and moved the secretarial office from Seremban to Setiawan, Perak and appointed a new company secretary ('the fifth defendant').

[11] The plaintiffs also alleged that Ming Chai had induced them and Cha Bok to attend at the new secretary's office in Setiawan to sign various documents in blanks which allegedly were for the preparation of papers for the appointment of a new secretary and for the purpose of procuring bank loan facilities and appointing him ('Ming Chai') as a new director.

[12] Sometimes in 2006, the company was granted loan by HSBC Malaysia Bhd (Melaka branch) in the amount of RM4.2m. However, Ming Chai failed to exonerate Cha Bok of his debts besides failing to surrender the shares in the company to the plaintiffs and failed to resign as a director as promised earlier.

[13] Later, the plaintiffs discovered that they were no longer directors of the company and their shares had been transferred to the first, second, third and fourth defendants by fraud perpetrated by Ming Chai with the assistance of the new company secretary, without their knowledge. The plaintiffs claimed that all the relevant Forms 32A for the alleged transfer of the shares from the first, second, third and fourth plaintiffs to the first, second, third and fourth defendants were forged. The plaintiffs then filed the present suit.

AT THE HIGH COURT

[14] After full trial, the learned High Court judge made, inter alia, the following findings:

(a) that the transfer of the shares from Cha Bok to Chin Chau; from Tui Eng to Su Keow; and subsequently from Chin Chau to the plaintiffs, were void pursuant to s 52(1) read with s 47(1) and s 3(1)(i) of the Bankruptcy Act 1967; and therefore the plaintiffs have no legal rights to claim ownership in the shares and accordingly have no legal right to invoke any relief under s 41 of the Specific Relief Act 1950;

(b) that the subsequent transfer of the shares from the plaintiffs in favour of the first, second, third and fourth defendants which the plaintiffs claimed was done fraudulently, amounted to providing security 'for loan to a person connected with a director by any person ...' and caught by the prohibition under s 133A(1) of the Companies Act 1965; and the shares were acquired by the first, second, third and fourth defendants conditional upon procurement of bank borrowing with the assets of the company as security, thus implying financial assistance by the company to deal with its own shares, therefore contravening s 67 of the Companies Act 1965;

(c) that in view of the contravention of ss 67 and 133A of the Companies Act 1965, the claim by the plaintiffs to relief premised upon allegation that the transfer of the shares in the company was actuated by a promise to secure borrowing for the company using as security the assets of the company to settle the debts of Cha Bok owed to other persons, was clearly unsustainable. It amounted to a claim premised upon an illegality which the court cannot lend a hand based on the maxim of 'ex turpi causa non ovitur action';

(d) that in view of the plaintiffs confirming that they were aware that they had signed the transfer Forms 32A in blanks, it is now not open for them to claim that there was fraud or that the documents were forged, as they have signed the forms with their eyes open, and they were not illiterate and neither were they novices where business is concerned;

(e) that the evidence of the signatures of the plaintiffs on the sale and purchase agreement (in respect of the sale of shares) suggested that it was highly improbable that the documents were signed in blanks at the time when the parties signed them, as alleged by the plaintiffs. The assertion by the plaintiffs that the documents were blank when they signed them, were weak, unsubstantiated and against the weight of the evidence adduced, and obviously the assertions were untrue; and

(f) that the plaintiff could not take advantage of their own wrong or carelessness when they chose to sign documents in blank, and later cried foul of any discrepancies.

AT THE COURT OF APPEAL

[15] The Court of Appeal was in agreement with the learned judge of the High Court and dismissed the appeal filed by the plaintiffs. In conclusion, the Court of Appeal ruled:

> Taking into consideration the facts of both cases in a holistic manner and the conduct of plaintiffs in both the suits and applying the law as was done by the learned judge, we do not think any reasonable tribunal would have granted the prayers sought in both the suits. We also do not want to go into the nitty gritty of the facts and application of the law by the learned judge as we took the view that the decisions of the judge to dismiss both the suits were correct decisions.

AT THE FEDERAL COURT

[16] We will now deal with the leave questions posed before us.

[17] Question 1 — relates to a question whether the transfers of movable property (in this case, the shares of the company) by the transferors (Cha Bok and his wife Tui Eng) to the transferees (Chin Chau and his wife Su Keow) in 2003 were void by reason of the insolvency of the transferors (ie when they were adjudged bankrupt), and if so were the transfers by the said transferees (Chin Chau and Su Keow) to subsequent transferees also void for want of title?

Section 52 of the Bankruptcy Act 1967

[18] As stated earlier, the High Court ruled that the transfers of the shares from Cha Bok and Tui Eng to Chin Chau and Su Keow and from Tui Eng to Su Keow, and subsequently from Chin Chau to the plaintiffs, were void pursuant to sub-s (1) of s 52 read with sub-s (1) of s 47 and sub-s (1) of s 3 of the Bankruptcy Act 1967 ('the Act'), and therefore the plaintiffs as the subsequent transferees had no locus standi to initiate the present claim against the defendants.

[19] The plaintiffs throughout the proceedings, maintained that their claim against the defendants was based on the fact that the first, second, third and fourth defendants had obtained the shares and directorship in the company by undue influence, fraud and forgery designed by Ming Chai with the help of the fifth defendant (the company secretary).

[20] The plaintiff's stand is any avoidance of settlement of property (including shares) under s 52 of the Bankruptcy Act is void. That section confers the right on the DGI to treat the settlement or transfer as void. The plaintiffs are entitled to invoke s 52 of the Bankruptcy Act for a declaration that the transfer of the shares to the subsequent transferees is void. The section gave

the way for the plaintiffs to maintain the present action. A

[21] The defendants, on the other hand maintained that the question posed by the plaintiffs in the present appeal as regards s 52 of the Bankruptcy Act has no effect on the findings of the learned judge and is therefore irrelevant. It was argued that from a plain reading of s 52, the effect of the section is to render a transaction void only as against the DGI. The section confers the right only on the DGI to treat the settlement or transfers of the shares as void as against himself but not other persons. In the present case, there was no attempt by the DGI to be a party, hence it is not open to the plaintiffs to invoke the section, especially in support of their claim. The defendants contended that the plaintiffs were not bona fide and were actuated by bad faith in attempting to agitate s 52 of the Act before the court. B C

[22] Subsection (1) of s 52 of the Act, is relevant for consideration in determining this question. It provides: D

> (1) Any settlement of property, not being a settlement made before and in consideration of marriage or a settlement made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void against the Director General of Insolvency, and shall, if the settlor becomes bankrupt at any subsequent time within five years after the date of the settlement, be void against the Director General of Insolvency, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof. E F G

[23] Section 52 of the Bankruptcy Act affects only settlement or transfer of shares by the bankrupt transferors (in this case, Cha Bok and Tui Eng) ie transactions between the bankrupt as the transferors and the immediate transferees. Subsequent transferees like the defendants do not fall within the ambit under s 52. Under the section, any transfer of property shall be absolutely void against the DGI if the transferor becomes a bankrupt within two years after the date of the transfer; and shall be void against the DGI if the transferor becomes a bankrupt after two years but within five years after the date the transfer. In the present case it is not in dispute that the transfers of the shares by Cha Bok and Tui Eng took place in 2003. Cha Bok was adjudged bankrupt on 9 November 2006 and Tui Eng was adjudged bankrupt on 25 March 2007. It is not disputed that their bankruptcies occurred after the transfers but within the period of five years stipulated in sub-s (1) of s 52. It must be stressed that the avoidance under s 52 is only 'against the Director H I

General of Insolvency'. As such only the DGI is entitled to a declaration that the said transfer or transaction is void, under the section.

[24] That being the case, the plaintiffs in the present case cannot invoke s 52 to avoid the transfers of the shares. The learned judge erred in her findings that the transfers of the shares by Cha Bok and Tui Eng to Chin Chau and to Su Keow within the stipulated period were void pursuant to sub-s (1) of s 52 of the Act. The learned judge had also erred in her findings that the subsequent transfers by Tui Eng and Chin Chau to the plaintiffs, were also 'null and void'.

[25] Section 52 of the Bankruptcy Act is not meant to avoid all transaction or settlement of property executed by the settlor within the period stipulated period therein. Section 54 of the same Act, provides protection for bona fide transactions without notice. Under sub-s (1) of s 54, with respect to the avoidance of certain settlements or preferences, 'nothing in the Act shall invalidate in the case of a bankruptcy, (d) any contracts, or dealing or transaction by or with the bankrupt for valuable consideration if the contract, dealing or transaction takes place before the date of the receiving order; and the other person had not, at the time of contract, dealing or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time'.

[26] Subsection (3) of s 53B of the same Act, provides similar which protection to subsequent transferee when it stipulates as follows:

> (3) Notwithstanding subsections (1) and (2), where any person, (not being the person who acquired the property from the bankrupt) to whom the property was sold, resold or otherwise disposed of, had paid or given therefor valuable consideration and acted in good faith such person shall not be subject to the operation of this section and the Director General of Insolvency's recourse for recovery of the consideration so paid or given or its value shall be solely against the person who entered into the transaction with the bankrupt.

[27] Under the above provision, the right or title of any subsequent transferee of the property (not being the person who acquired the property from the bankrupt) is saved from the effect of s 52 of the Act. The title of any subsequent transferee who had given valuable consideration and had 'acted in good faith' passes to the transferee and remains with the transferee. The DGI cannot challenge his title. The DGI's only recourse for recovery of the consideration or money so paid or its value shall be solely against the person who entered into the transaction with the bankrupt or the immediate transferee, but not against subsequent transferee who had given valuable consideration and had 'acted in good faith'.

[28] In the present case, by virtue of sub-s (3) of s 53B of the Bankruptcy Act, the title or rights on the transferred shares passed to and remained with the

defendants (as subsequent transferees), who had given valuable consideration in the form of money for a value of RM60,000 for the 60,000 shares and had 'acted in good faith' in the transaction. The said shares were purchased by and transferred to the defendants on 15 June 2005. The transfer took place more than one year before the adjudication. It would be impossible for the defendants to have known that the plaintiffs had obtained their titles from a bankrupt or 'bankrupt would-be'. Therefore, the defendants had clearly acted in 'good faith' in acquiring the shares from the plaintiffs. There is no evidence adduced during trial that the defendants had acted in 'bad faith' in the transactions.

[29] Based on the above consideration, our answer to question 1 is as follows: The transfer of a movable property by a transferor who was insolvent or adjudged bankrupt to a transferee is void. However a further transfer of the said properly by the said transferee to a subsequent transferee is not void for want of title if the subsequent transferee has given valuable consideration and has 'acted in good faith' in the transaction.

Fraud, forgery and undue influence

[30] The plaintiffs' main challenge to the titles of the defendants on the shares in question was premised on the ground that the transfer of the shares to the defendants was vitiated by fraud, forgery and undue influence. The plaintiffs alleged that the transfer of the shares was by way of forgery of documents ie Forms 32A; and by way of undue influence by Ming Chai and without the knowledge of the plaintiffs. Essentially the plaintiffs were pleading *non est factum*.

[31] Particulars of fraud of Ming Chai as pleaded by the plaintiffs are as follows:

(a) preparation of a disguised agreement as if a sale of real estate existed when in actual fact it was a transaction for loan of moneys between Cha Bok and Ming Chai;

(b) influenced the plaintiffs to appoint himself as a director of the company to procure bank borrowings and to believe that the loan was apparently to satisfy the debts of Cha Bok;

(c) agreed and promised, but refused, to return the shares in question and refused to relinquish his directorship in the company; instead, he appointed the second, third and fourth defendants as directors of the company;

(d) conspired and abetted with the fifth defendant to falsify documents of the company including the transfer forms — Forms 32A; and

(e) conspired and abetted with the fifth defendant to unduly influence the plaintiffs to sign several blank documents for bank borrowings.

[32] The particulars of fraud as pleaded by the plaintiffs are facts-based. They are purely questions of fact to be evaluated based on the evidence adduced during trial. That being the case, the learned trial judge who had heard and observed the witnesses was in the best position to decide on the matter and accordingly came to the necessary findings.

[33] The learned judge after full evaluation of the totality of the evidence adduced made found that the plaintiffs had failed to establish their claim against the defendants based on the balance of probabilities and therefore the plaintiffs' action was dismissed with costs. The Court of Appeal affirmed the said decision. The Court of Appeal took the view that the decision of the trial judge to dismiss the plaintiffs' action was correct.

[34] On our part, we have perused the notes of evidence as well as the judgments of the courts below, and we are also of the same view with the Court of Appeal that the decision of the learned judge in dismissing the plaintiffs' action against the defendants was correct. As it stands, the allegations of fraud, forgery and undue influence, as pleaded by the plaintiffs in their attempt to get the transfer of the shares in question to the defendants be declared void, were not proven on the balance of probabilities by credible evidence. Therefore, the plaintiffs' attempt to get the transfers of the shares declared void must fail, and be dismissed.

Question 2

Section 41 of the Specific Relief Act 1950

[35] Question 2 arose on the ruling of the learned judge that 'the plaintiffs have no legal rights to claim ownership in the shares, and accordingly have no legal right to invoke any relief under s 41 of the Specific Relief Act 1950'.

[36] The plaintiffs argued that a plaintiff in an action for a declaration does not require to show that he has a present cause of action (citing the decision in *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 as an authority). The plaintiffs contended that the learned judge after holding that the transfers of the shares in the present case were caught by s 52 of the Bankruptcy Act 1967 because of the subsequent insolvency of the transferors, and were therefore void, should have held that since the plaintiffs took no title to the share, the relevant defendants as subsequent transferees obtained no title as well. The plaintiffs' stand is that even if they have no present cause of action, they are justified in asking for a declaratory order outside the scope of s 41 of

the Specific Relief Act 1950 by virtue of O 15 r 16 of the Rules of the High Court 1980 (now the Rules of Court 2012).

[37] The plaintiffs' submission above was based on the assumption that the transfers of the shares were void by virtue of s 52 of the Bankruptcy Act 1967 and the plaintiffs had not obtained good title to the shares. However, as we have stated earlier, the transfers of the shares in the present case were not avoided under the section against any person (except the DGI). Therefore the issue as submitted by the plaintiffs did not arise and the court was not obliged to exercise its discretion to make any declaratory order under s 41 of the Specific Relief Act 1950, nor under O 15 r 16 of the Rules of the High Court 1980.

[38] Accordingly, we are of the view that question 2 need not be answered.

Question 3

'No case to answer'

[39] With regard to question 3, learned counsel for the plaintiffs contended that in a suit where there are several defendants, each defendant has his or her own case which he must open and close; and a party who elects to submit no case to answer must stand and fall on his submissions. According to the plaintiffs, in the present case, the first, second, third, fourth, and sixth defendants made submissions of no case to answer at the end of the plaintiffs' case. The learned judge did not put those defendants to election to stand or fall on their submissions. Instead, the learned judge allowed those defendants to call evidence.

[40] The plaintiffs argued that the course permitted by the learned judge was against settled authorities, and it was wrong in principle and a breach of procedural fairness to permit a defendant who has elected to make a submission of no case to answer to call evidence in his defence.

[41] Learned counsel for the defendants, on the other hand submitted that any answer to question 3 would be irrelevant on ground that the premise of question 3 as drafted by the plaintiffs is factually wrong. According to learned counsel, on the facts of the case, at the close of the plaintiffs' case only the first to fourth defendants made submissions of no case to answer, while the sixth defendant, although represented by the same counsel, did not make such a submission. In fact at the close of the plaintiffs' case, counsel for sixth defendant informed the court that the sixth defendant would be calling a subpoenaed witness, the stakeholder of rental monies. There was no objection by the plaintiffs against the calling of the said witness. Therefore, the sixth defendant was fully within its right to call evidence.

[42] In the present case, the records show that at the close of the plaintiffs' case only the first to fourth defendants made a submission of no case to answer. The sixth defendant, although represented by the same counsel did not make such a submission. Learned counsel for the sixth defendant informed the court that the sixth defendant intended to call one subpoenaed witness and 'this witness will be coming on Monday'. At the continuation of the trial two witnesses (DW2 and DW3) were called to testify in the defence of the sixth defendant. The first to fourth defendants did not call any witness after submitting no case to answer. The other witness (DW1) was called by the fifth defendant (who was not involved in the issue of no case to answer). The calling of DW2 and DW3 by the sixth defendant was the source of the plaintiffs' complaint on this issue.

[43] It is not in dispute that when learned counsel for the first to fourth defendants made a submission of no case to answer, the learned judge did not put them to election. Perusal of the records of proceedings indicated that no such election was ever put the counsel at that time.

[44] Learned counsel for the plaintiffs complained that the evidence of the plaintiffs that they had signed blank A4 papers and Forms 32A for the share transfers in their allegations were not challenged by the first to fourth defendants, as they failed to adduce any evidence refuting the plaintiffs' testimony; and thus the trial judge has failed to judiciously evaluate the evidence on the basis of no case to answer.

[45] This practice which should be followed by the court in such circumstance has been approved again and again in a number of authorities such *Laurie v Raglan Building Co Ltd* [1942] 1 KB 152 (CA); *Yuill v Yuill* [1945] 1 All ER 183; *Storey v Storey* [1961] P 63 (CA); *Ramayee Gengau & Ors v Tan Yik Kok & Anor* [1983] 1 CLJ 326; *Simirah v Chua Hock Lee & Anor* [1963] 1 MLJ 239; and *Young v Rank* [1950] 2 KB 510.

[46] The basic principles on the issue as adopted in those authorities cited above may be summarised as follows:

(a) where the defence submits no case to answer, the trial judge must put to the defence the election available as to whether he wishes to call evidence for the defence or not; the judge should generally refuse to make such a ruling on such submission of no case to answer unless the defence makes it clear that he does not intend to call evidence;

(b) if the judge does not put the defendant to election whether to call evidence or not, then in such a situation the defence retains his right to call evidence if his submission fails; and

(c) if the defendant or his counsel has so elected, he is bound by it and loses his right to call evidence in the defence case and accordingly must stand or fall on their submission.

[47] The following statement by Lord Greene MR, sitting at the Court of Appeal, in the case of *Yuill v Yuill* provides a clear picture on the issue:

> It does not mean that counsel by submitting no case ipso facto loses his right to call evidence if his submission fails. He only loses that right if he definitely elects to call no evidence. He may make this election expressly or (as in *Laurie v Raglan Building Co Ltd*) impliedly. The practice which has been laid down amount to no more than a direction to the judge to put counsel who desires to make a submission of no case to his election and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected he is, of course, bound: but if for any reason, be it through oversight or (as here) through a misapprehension as to the nature of counsel's argument, the judge does not put counsel to his election and no election in fact takes place, counsel is entitled to call his evidence just as much as if he had never made the submission.

[48] This court in *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609 has laid down the principle on this issue in the following words:

> The respondent's election to call no evidence at the trial did not preclude the reversal of plainly wrong findings of the High Court by the Court of Appeal. Though no witnesses were called by the respondent and even if the appellant's evidence was unopposed and therefore presumed to be true, that did not automatically mean the evidence had satisfied the burden of proving the existence of the settlement agreement borne by the appellant, or mean the burden of proving on balance of probabilities no longer applied or that a case to answer was automatically made out. The evidence adduced by the appellant had to be sufficient to prove the existence of the settlement agreement. The appellant failed to discharge that burden.

[49] The above ruling was consistent with the well-established principle that the burden of proof at all times is borne by the plaintiff on the balance of probabilities to establish his case against the defendant or the existence of a legally enforceable claim against the defendant. It is upon the plaintiff, and certainly not the defendant, to discharge that burden. It is for the plaintiff to prove his case and satisfy the court that his claim is well-founded before the court can grant judgment on his claim. The fact that the defendant has led no evidence or called no witnesses does not absolve the plaintiff from discharging his burden in law.

[50] In this regard, Suriyadi, JCA (as His Lordship then was) in *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81, recognised the above ruling in the following passage:

A There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been B discharged.

[51] In the present case, the learned judge had exhaustively and painstakingly assessed the evidence of the plaintiffs in its totality in establishing the facts and came to her conclusion, with elaborate reasoning and grounds, C that the evidence of the plaintiffs did not meet the requisite standard of proof required, on the balance of probabilities, to establish their claim against the defendants. Even if the first to fourth defendant did not call any evidence to challenge or repute the plaintiffs' witnesses, it does not mean that the trial judge must believe everything the plaintiffs had adduced. The court on its own is D duty bound to assess the evidence adduced by the plaintiffs. The court can only accept the uncontested evidence if it crosses the civil standard of proof recognised by proper rules and procedure.

E **[52]** In this case, the trial judge had made the correct findings on the factual issues in question that the plaintiffs had failed to establish the elements of fraud, forgery and undue influence as claimed and that findings were affirmed by the Court of Appeal. This court ought not to interfere with the findings.

F **[53]** With the above consideration, we have sufficiently dealt with the relevant issues under question 3 in the context of the facts and circumstances of the present case. We are therefore of the view that question 3 need not be specifically answered. In that context we hold that the plaintiffs' complaint on the issue is baseless and without merit.

G

Section 133A of the Companies Act 1965

[54] In addition to the ruling under s 52 of the Bankruptcy Act 1967, the learned judge had also ruled that 'the said transaction contravened s 133A(1)(a) H and (1)(b) of the Companies Act 1965. This amounts to providing security for loans to a person connected with a director by any persons …', which is caught by the prohibition under s 133A sub-s (1) of the Companies Act 1965. The learned judge found that the transaction where the company provided security in connection with the loan purportedly made to Cha Bok (who is connected I to the first, second and fourth defendants) by the bank is prohibited under s 133A of the Companies Act 1965.

[55] Subsection (1)(a) and (b) of s 133A of the Companies Act 1965 provides as follows:

133A Prohibition of loans to persons connected with directors.

(1) Subject to provisions of this section, a company (other than an exempt private company) shall not —

(a) make a loan to any person connected with a director of the company or of its holding company; or

(b) enter into any guarantee or provide any security in connection with a loan made to such person by any other person.

[56] A plain reading of s 133A of the Companies Act 1965 shows that in order to invoke the prohibition under sub-s (1)(a) of the section, there must be evidence to show that it is the company itself (in this case Tampin Theme Park) that gives loan to the prohibited person ie to any person connected with its director or a director of its holding company. The company itself must be the lender, not the borrower. For sub-s (1)(b) of s 133A to come into play, there must be evidence to show that it was the company itself which has entered into 'any guarantee' or 'provided' any security in connection with a loan made to such person by any other person'. The company must be the guarantor to a loan given to any person connected with its director or a director of its holding company; or the company provides security in connection with the loan in question.

[57] In the present case, the loan in question was granted by HSBC Malaysia Bhd (Melaka Branch), as the lender, to the company itself (Tampin Theme Park), as the borrower. The security provided by the company was for its own loan, not for anybody else. Hence, the question of the prohibition under s 133A of the Companies Act 1965 does not arise at all. The promise by Ming Chai that the proceeds of the loan were to be used to exonerate Cha Bok of his debts is immaterial for the purpose of the section. In any event, the evidence showed that Ming Chai had failed to fulfill the said promise. We therefore, with are not in agreement with the learned judge on this point.

Section 67 of the Companies Act 1965

[58] The learned judge had also ruled, in addition, that the shares in the company which were acquired by the first, second, third and fourth defendants were conditional upon procurement of bank borrowings with the assets of the company as security, implying a form of financial assistance by the company to deal with its own shares.

[59] The learned judge concluded on this issue:

Therefore, in view of the prohibitions by ss 67 and 133A of Companies Act 1965, the claim by the plaintiffs to relief premised upon allegation that their transfer of shares in D6 was actuated by a promise to secure borrowings for the D6 using as

A security the assets of D6, to settle the liabilities of Yui Cha Bok owed to other persons is clearly unsustainable. It amounts to a claim premised upon an illegality which the court cannot lend a hand based on the maxim of ex turpi causa non oritur action.

B **[60]** Section 67 of the Companies Act 1965 deals with 'dealing by a company in its own shares', etc. Subsection (1) provides:

> 67(1) Except as is otherwise expressly provided by this Act, no company shall give, whether directly or indirectly and whether by means of a loan, guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares.

C

D **[61]** Subsection (1) prohibits inter alia the giving of 'any financial assistance for the purpose of or in connection with the purchase or subscription made or to be made by any person of and for any shares in the company. The financial assistance can be in the form of 'a loan, guarantee or the provision of security or otherwise'.

E

[62] In the present case the loan by HSBC Malaysia Bhd (Melaka Branch) was given to the company itself. The company was the borrower. The company received and utilised the proceeds of the loan. The company had provided its assets as security in order to secure the loan. The loan was not granted to the

F first, second, third and fourth defendants. There was also no evidence to show that the assets of the company were given out as security for any loan or financial assistance given to any of the defendants as the subsequent purchasers for the purpose of purchasing the shares in question from the previous shareholders. The promise 'to secure borrowings' for the company as the basis

G for the learned judge's ruling on this issue, is insufficient to invoke the prohibition of 'dealing by a company its own shares' as provided under s 67 of the Companies Act. There is nothing illegal under the section for a company to provide security on its own assets for the purpose of securing a loan for itself. Section 67 of the Companies Act 1967 does not come into the picture. The

H learned judge erred in her findings on this issue.

CONCLUSION

[63] Based on the above reasoning, we summarise our findings as follows:

I (a) the plaintiffs had failed to establish their claims on their allegations of fraud, forgery and undue influence as pleaded in their statement of claim; hence their attempt to declare void and to set aside the transfer of the shares in question to the defendants on this ground was correctly dismissed by the courts below;

(b) the plaintiffs cannot invoke s 52 of the Bankruptcy Act 1967 in getting the transfers of the shares from Cha Bok and Tui Eng declared void by the court as the plaintiffs do not have the necessary locus standi to bring this action against the defendants. Only the DGI is entitled to do so under the section;

(c) the prohibitions under ss 133A and 67 of the Companies Act 1965 are not applicable to the facts and circumstances of the present case relating to the transfers of the shares to the defendants; therefore the transfers cannot be declared void on this ground; and

(d) the learned judge was right in allowing the sixth defendant to call (DW2) and (DW3) adduced evidence in its defence on the ground that sixth defendant did not make any submission of no case to answer; hence the sixth defendant was still entitled in law to call evidence in its defence.

[64] In the upshot, we dismiss the appeal with costs.

Appeal dismissed with costs.

Reported by Izzat Fauzan